

## **SPORT NORTHERN IRELAND**

### **MINUTES**

### **CONFIDENTIAL**

#### Special Meeting 2009

Held on 22 September 2009 in the House of Sport, Upper Malone Road, Belfast, BT9 5LA.

#### **PRESENT**

In the Chair:	D Walsh
Members:	M Cowan J D'Arcy U Duncan B Macauley B McCargo A Moneyppenny J Rodgers
Chief Executive	E McCartan
Staff in Attendance:	N Harkness S Ogle A Sloan E Bailey A Campbell

#### 1. **PRESENTATION**

In advance of the meeting, the Sports Council's Chairman made a presentation to mark the work and retirement of Martin Lindsay, Editor of the Belfast Telegraph.

#### 2. **APOLOGIES**

Apologies were received from H McCaughey, D O'Connor, A Strong, P Turnbull, O Brown and M Muldoon.

#### 3. **CHAIRMAN'S BUSINESS**

The Chairman welcomed Members and congratulated A Moneyppenny on his appointment to the position of Vice-Chair of the Sports Council.

#### 4. **DECLARATION OF INTERESTS**

The Chairman asked everyone individually if they had any interest to declare.

***Cllr Jim Rodgers declared and left the meeting.***

**5. MINUTES**

The Minutes of the Special Meeting held on 27 August 2009 were circulated and read by Members. The Chairman requested that an item on page three (eighth paragraph) was amended from 'had not been able to turn up' to 'had as yet not been able to arrive'. The minutes were then approved by Members.

**6. MATTERS ARISING**

Members requested an update on the incident at the GAA ground in Co Tyrone noted at the last meeting. The Chairman informed Members that the Minister had requested Sport Northern Ireland to review their terms and conditions of grant-in-aid; to ascertain if the incident did in fact breach these or to ensure that they were amended to address such an infraction in future. The Chief Executive also informed Members that a report into the incident was pending from the Gaelic Athletics Association ('GAA').

Members also requested an update from the meeting with the Chairman, the Chief Executive and the Minister, relating to the delay of the consideration of the Strategy for Sport by the Executive Committee of the Assembly. The Chairman informed Members that the Minister was sympathetic. The Chief Executive also provided Members with some context; that there were approximately 60 plus papers pending for Executive Committee consideration at present.

The Chairman reminded Members that there were two Performance Appraisal Self-Assessment Forms outstanding and that these should be returned as soon as possible.

**7. CORRESPONDENCE**

There was no correspondence.

**8. PARTICIPATION UNIT**

Elite Facilities Programme

The Chairman welcomed solicitors, Mr P Curran and Mrs L Mallon, who were in attendance from Arthur Cox, and who (along with Senior Counsel, M Bowsher Q.C., and Junior Counsel, P McLaughlin B.L.), had been advising Sport Northern Ireland in relation to the programme.

Members were reminded of the judgment of the High Court on 14 August 2009 requiring Members to make a fresh decision on Belfast City Council's applications for funding for separate Indoor Athletics and Velodrome facilities at Stage Two of the Elite Facilities Programme.

The Chairman then asked Officers to take Members through the tabled Paper SNI/09/138 entitled: 'Elite Facilities Programme – Stage Two

Application from Belfast City Council' (the 'Paper') and appended documents, all of which were circulated.

It was explained to Members that Belfast City Council (BCC) had confirmed in writing that it wished to withdraw its application relating to the Velodrome facilities. Members were therefore only required to reconsider BCC's Indoor Athletics application. It was noted that the Velodrome application had also sought funding for table tennis and volleyball facilities.

Members sought confirmation as to whether there were other competing applications for Indoor Athletics facilities. It was confirmed to Members that there was one other application for an Indoor Athletics centre.

It was explained to Members that they would be asked to make a fresh decision at the meeting, based on a full and detailed consideration of all the facts, as to whether or not BCC's Indoor Athletics application met the deadline for submission. If Members decided that the application did not satisfy this requirement then Members should decide whether to exercise their discretion to either (a) accept the application but proceed on the basis that a reduced offer of award will be made; (b) accept the application without a reduced offer of award; or (c) exclude the application.

Members were provided with an opportunity to read the Paper and to review other relevant documentation and correspondence referred to in the Appendix to the Paper (much of which Members had previously seen and were familiar with).

Before proceeding further, Members confirmed that they believed they had all the information required for them to consider the matter fully and that they had been afforded ample time to consider all relevant documentation and correspondence.

Officers then took Members through the Paper, section by section.

It was noted that two Members of the Appeals Committee had absented themselves from all Sports Council decisions relating to this matter, including this meeting, in order to maintain the integrity of the appeals process.

Members attention was drawn to the decision of the High Court of 14 August 2009 (set out at Appendix 3 to the Paper).

Members noted that the High Court had determined that the Council's decision of 20 February 2009 was unlawful for reasons of procedural unfairness (in particular, paragraphs 25 and 26 of the High Court judgment were referred to). Members' attention was drawn to the wording of the Sport Northern Ireland Appeals Procedure.

Members noted that the Court had directed that the issue of a reduced offer of award ought to have been considered by the Council, although the

Court had not expressed a view as to whether a reduction would in fact be appropriate or provided guidance as to how the Council should approach this task.

Members were reminded that they were now tasked with making a new and fresh decision, taking account of all relevant matters and disregarding the decision of the 20 February 2009, as if it had never been taken. Members were advised that they should consider all of the matters which they previously identified as relevant (although they could change their minds on these issues if they felt this was appropriate) and any new matters which they felt were relevant to their decision making, and to consider the possibility and appropriateness of making a reduced offer of award.

It was noted that representations had been sought by Sport Northern Ireland from BCC and FGS McClure Watters, following the High Court decision. Members were provided with a further opportunity to read the correspondence received from these parties since 14 August 2009 (set out at Appendix 4 to the Paper).

### **Question of Lateness**

Members were invited to make a fresh determination as to whether the BCC Indoor Athletics application had been received after the relevant deadline. They were advised that if they had any doubt about this, they should state this and accept the application.

Members noted that, as stated previously in Paper SNI/08/216 (which was appended to SNI/09/25 in February 2009) (included in the documents set out at Appendix 1), all Stage Two applicant organisations to the Elite Facilities Programme, were required to submit an application/Outline Business Case ('OBC') and associated documents '*before 4pm precisely on Friday 28 November 2008...to the House of Sport reception*'. Members noted that applicant organisations had known about the deadline for over five months. Members agreed that the timescale for preparation and submission of the application/OBC had been appropriate.

Members noted that the deadline was communicated to applicant organisations in the Stage Two letter of 25 June 2008, on CD Rom and on the internet. The deadline time and date were repeated in Guidance Notes One, Four and Twenty-Six. The deadline had also been restated at briefings. The relevant consultant at FGS McClure Watters had also been reminded of the deadline one week before submission and the BCC representatives were contacted by telephone on the 26 November 2008 to remind them of the deadline.

Members agreed that there was no doubt that Sport Northern Ireland took every reasonable action to emphasise the critical importance of the deadline to applicant organisations.

Members were guided through the procedures relating to the management of the receipt of Stage Two applications. Members noted the

extract at section 4.2 of Paper SNI/08/216. Members were also reminded of the management plan, implemented on 28<sup>th</sup> November 2008, to effectively manage the submission of Stage Two applications. The specific witnesses present at reception on that day were noted as the Elite Facilities Programme Manager, the Stadia Safety Manager, the Elite Facilities Programme Assistant and the SNI receptionist.

Members were reminded of the communications with FGS McClure Watters from 3.20pm onwards and the chronology of events on 28<sup>th</sup> November 2008, as outlined in Paper SNI/08/216.

Officers explained to Members how the receipts for applications were issued. It was explained that the receipt book had been completed in readiness for the arrival of a number of applications, with the time to be inserted upon their arrival. This was to expedite the process of issuing receipts. The Coleraine Institute application was delivered by FGS McClure Watters seconds before the deadline and a receipt was issued for this which then affected the order in which receipt numbers were issued. Members confirmed that they were entirely satisfied with the receipt process.

The Chairman asked if Members had any doubt about the timing of the receipt of the BCC application. Members unanimously agreed that, having considered the representations of BCC and FGS McClure Watters and all relevant circumstances, they were satisfied that there was no evidence to indicate that the BCC application was received before 4pm on Friday 28 November 2008, as required by the programme documentation. Members determined that the BCC's Indoor Athletics application was late in being submitted.

### **Exercise of Discretion**

Following Members determination that the application was late, Members were invited to consider whether they should nevertheless exercise a discretion to:

- accept the application on the basis of making a reduced offer of award;
- accept the late application (with no reduced offer of award); or
- not accept the late application at all.

Members were reminded that they must consider all matters they felt were relevant to the exercise of their discretion with a fresh and open mind. Members were also encouraged to state their views openly at this meeting. Members were informed that they should also consider the weighting or importance to be attributed to all factors considered relevant to the exercise of their discretion.

Members were advised that the possibility of a legal challenge against their decision should have no bearing on their decision making. Members agreed.

### **Reduced Offer of Award**

It was noted by Members that neither the High Court nor the Elite Facilities Programme documentation provided any guidance as to how to approach the issue of reduction of award. Members entered into some debate about how they would approach the issue and it was unanimously agreed that Members should consider the possibility and appropriateness of a reduced award first, before considering the possible inclusion or exclusion of the BCC application.

Members noted that BCC and FGS McClure Watters had both been invited to make any representations that they deemed to be appropriate in the circumstances and, in particular, they were invited to comment on the process which Sport Northern Ireland might follow when determining whether or not to accept the applications subject to a reduced offer of award.

Members considered the points made by Belfast City Council in their letter, dated 15 September 2009. Members noted in particular the reference in the letter to the World Police and Fire Games and were informed that the existing facilities at the Belfast City Council Mary Peters Track were viewed as satisfactory by the organisers of that event. It was noted that the BCC Mary Peters track would be used in the World Police and Fire Games for decathlon only (according to the bid documents for the event). The Chairman noted that the athletics application from Belfast City Council to the Elite Facilities Programme was for a high performance training centre and not an events facility.

Members sought clarification as to whether the proposed upgrade of the BCC Mary Peters track was the subject of the BCC application to the Programme. It was confirmed that it was not. According to the Belfast City Council letter, BCC appears to have taken the decision to progress with the track works, subject to approval of the indoor high performance training facility (the indoor training facilities being the subject of the application to the Elite Facilities Programme, not the track).

It was noted by Members that in its letter BCC did not address how a reduced offer of award could or should be applied, nor indeed what level of reduction would be appropriate.

Members were referred to paragraph 6.4 of the Paper and to a proposal therein as to how they might approach the question of a reduced award. Members asked whether there was any precedent for a reduced offer of award being made in similar circumstances where there was eligibility infringement, and it was confirmed that there was not.

After some discussion, Members agreed unanimously that the two stage approach referred to in paragraph 6.4 of the Paper offered a sensible way

forward. It was therefore resolved to consider firstly whether it would be technically and practically possible, and fair and appropriate as a matter of principle, to make a reduced offer of award. Members agreed that if this test were satisfied then they would proceed to consider what amount of reduction ought to apply and what part or parts of the application should be reduced.

Members were then referred to paragraph 6.5 of the Paper and they considered whether it would be useful to agree some guiding principles to assist them in considering the issue of reduction. All Members agreed that this was a reasonable and sensible approach.

Members then considered each of the principles suggested in paragraph 6.5 of the Paper. Each was discussed in some detail.

It was noted that FGS McClure Watters had made some representations in correspondence that the issue of reduction should be considered at the conclusion of the award stage. This was relevant to the proposed principle that any decision on reduction should be made without reference to the content of an application. After discussion, it was unanimously agreed that it would be unfair or potentially unfair to consider the reduction issue after the assessment of the application. The Council would also leave itself open to the accusation that any decision it made was influenced by the assessment(s) it had undertaken. This was later borne out in Members discussions.

Members unanimously agreed that each of the guiding principles referred to in paragraph 6.5 of the Paper were appropriate, relevant, reasonable and ought to be taken into account in their deliberation of the issue of reduction in order to ensure consistency and fairness in the process. The Chairman invited Members to discount any of these principles, add to them or modify them, but Members considered that they were content with the principles as expressed in the Paper. These were as follows:

- (a) A reduction should not be imposed or have an effect which is inconsistent with the objectives and purposes of EFP.
- (b) A reduction should not result in a material change to the content of the application.
- (c) Decisions on a reduction should be made without reference to the content of the application.
- (d) Any reduction should be proportionate to the reasons for ineligibility.
- (e) The applicant should not benefit as a result of any reduction.

Members were reminded that the Stage Two application submitted on behalf of BCC had not been opened or assessed by SNI, but the information that was known about the application from Stage One was summarised for Members. It was noted that this information may have changed in the Stage Two application.

Members then considered the meaning of the term 'reduced offer of award' and how it should be interpreted. Members questioned what had

been meant by use of this term in the Appeals Procedure. Officers said they believed it was intended to refer to a financial reduction. Members agreed that the most apparent and plain interpretation of the term was consistent with a financial reduction. Although it did not seem to refer to a reduction of points, Members agreed to consider this possibility also. Members considered whether the term 'reduced offer of award' should be interpreted in any other way and agreed that it should not.

Members then considered whether it would be technically and practically possible, and fair and appropriate, to make **a financial reduction** (either by way of a percentage reduction or a fixed sum reduction) in this case.

Members were reminded of the various stages of the EFP Programme and the Programme's Eligibility and Assessment Criteria.

It was considered whether a financial reduction could and should be made at any stage, including prior to any assessment of the BCC application, during assessment of the application and at any time after assessment of the application.

Officers explained that the reduction of any offer of award, (either by a percentage or a fixed sum) *prior to any assessment or evaluation* of the application, would in their view give rise to significant issues. Members were taken through the various Eligibility and Assessment Criteria in detail and it was pointed out that certain serious difficulties (referred to below) could arise in evaluation if a financial reduction were to be applied pre-assessment. It was noted that a financial reduction would have a direct impact on the evaluation relating to various Eligibility and Assessment Criteria (e.g. Criteria 7, 8, and 9).

Officers explained to Members that if Sport NI were to specify in advance a reduction in the award that might be offered, this would impact on the data actually submitted by the applicant for assessment. Any specified reduction of award would render inaccurate the detailed information set out in BCC's Stage Two application, which was of course predicated upon a full award being granted.

Members were reminded that Stage Two of the Elite Facilities Programme was designed to transparently identify and prioritise the best applications per sport and evaluate the OBC. The reduction of any offer of award would create an inaccurate basis upon which the Council would take decisions about whether the application should progress to Stage Three, and the basis upon which the OBC would be scrutinised by SNI, DCAL and DFP. Officers further clarified for Members that one of the main objectives of the Elite Facilities Programme Stage Two assessment and the NI Green Book OBC evaluation process was to ensure that only projects, with business justification, which are financially viable and sustainable, would progress to the next stages, when they may be awarded very substantial amounts of public funds. Imposing a reduced offer of award would render the submitted application/OBC inaccurate; it would not in fact reflect the ultimate financial/economic status of the project.



Changes to the amount of the award actually sought by BCC would affect the financial make-up of the application and create an information void for assessors in relation to the funding of the project. Officers noted that Criterion 8 (dealing with operational viability and sustainability) required applicants to provide evidence they could secure the necessary partnership funding for the project. A reduced award could render the project not financially viable or at least a shortfall in funding would be created. A reduction could also affect the information provided in relation to Criterion 9 (which dealt with optimum timeframes and management structures). A reduction could cause the applicant to source additional funding which would not have been a factor in the submitted programme. Members noted that to request additional information of BCC in these circumstances could afford them an opportunity to improve their application that was not afforded to other applicants and this would be unfair especially if it resulted in a material change to the content of the application or resulted in a benefit accruing to BCC.

Officers explained further that BCC could even benefit from the reduction because it would obtain a higher score in terms of value for money as a result. Members agreed that it would be unfair to other applicants if BCC were to actually benefit from submitting a late application. In this regard, Criterion 7 was referred to in particular and Officers explained that the value for money assessment of BCC's application would be improved by a reduction of award. A reduction would actually increase BCC's score against this criterion when the (reduced) financial award was weighed up against BCC's Key Performance Indicators.

It was agreed by all Members that quite apart from the serious technical or practical issues that a financial reduction would give rise to, there could, in their view, be no fair way of determining, in a transparent manner, what the level of that financial reduction ought to be. Members noted that there was no guidance at all in the programme documentation as to how a financial reduction ought to be made. There is no obvious way for the Council to fairly and transparently convert 'minutes late' into a percentage or fixed sum reduction. Members considered whether there was any recognised external benchmark that could be used for this purpose but it was not clear that any suitable benchmark existed. All Members agreed that it would be a somewhat arbitrary decision and, depending on the effect that it had on the ultimate outcome of the competition, it could be considered unfair by any applicant who might be adversely affected by it. The Programme had simply not contemplated making a reduction of award in these circumstances. Members felt that to make a reduction at this stage would be artificial and likely to be considered unfair.

Having discussed the matter carefully and in detail, Members unanimously resolved that the determination of any reduced form of offer of award prior to any assessment was not practical or technically possible and would not allow all of the guiding principles agreed earlier to be adhered to. In addition, Members considered that it would constitute a departure from the published evaluation process and was not a fair or appropriate solution to apply in the circumstances of this case.

Members then considered the possibility of reducing any offer of award (either a percentage reduction of a reduction by a fixed sum) *following* an assessment of the application.

Members acknowledged that this seemed to offend the third of the guiding principles above. Nevertheless, Members decided to consider what other issues a post-assessment financial reduction would give rise to.

Officers explained to Members that a post-assessment reduction would also create practical or technical problems, as, again, the assessment findings would be based ultimately on inaccurate information. The assessment process was designed to accurately support the best projects (as determined by the established assessment criteria) but the imposition of a financial penalty post-assessment could adversely impact on the integrity of that process.

Members were again taken through each of the Eligibility and Assessment Criteria. Members considered the effect of imposing a financial penalty at the post-assessment stage on each of these. It was noted that the imposition of a financial reduction following the assessment process would impact on the results of evaluation against a number of the Criteria (e.g. 1, 2, 7, 8 & 9).

In relation to Criterion 1, the technical option may no longer be the preferred option if the award were to be reduced following assessment. There would be a question mark over the option specified in the application and the scores awarded to it, if later the award were to be reduced. Additional information would have to be obtained in order to ensure accuracy.

Members considered that the assessment of Criteria 2 and 7 would also be inaccurate if a reduced offer of award were subsequently made and again it would be unfair to give BCC an opportunity to amend its application in this regard.

In relation to Criterion 8, Members agreed that the assessor would be looking at an inaccurate picture of funding in the application, if a reduced offer of award were made post-assessment. A higher score would be awarded than if the reduced offer of award were clear at the time of assessment. Members noted that as a result of a reduced offer of award, an application considered viable during assessment may turn out to be not viable.

In relation to Criterion 9 involving the assessment of applications against an optimum timeframe, the programme assessed would not have taken into account any time required to source additional funding or make other changes to the project. Members noted that, in these circumstances, the applicant would be likely to obtain a higher score than it in fact warranted in light of a subsequent reduction.

Overall, it was recognised that the assessment process is carried out in relation to a technical proposal backed by a financial package. Later changes to the financial/funding package could undermine the robustness of the evaluation of both technical and financial aspects of the bid. Scoring would not be accurate if a reduced offer of award were subsequently made. BCC would probably score higher than it ought to and this would clearly be unfair.

Any changes to the amount of the award actually sought by BCC would affect the financial make-up of the application and again, would create an information void for assessors in relation to funding. Members noted again that to request additional information of BCC in these circumstances could afford them an opportunity to improve their application that was not afforded to other applicants and this would be unfair especially if it resulted in a material change to the content of the application or a material benefit accruing to BCC.

Members noted that the financial viability of the project could be affected by a reduction but it would not be clear what impact this would have on the bid without further information being provided by the applicant.

Members made the point that if the Council were to apply a reduced award after the assessment was carried out, this again would be an arbitrary reduction, determined in an entirely opaque manner, contrary to the principle of transparency upon which the entire evaluation process was intended to be based, and for this reason it would be unfair to whomever was adversely affected by it (either BCC or other applicants). Members noted that either way the Council could be accused of manipulating the result to suits its own purposes through the quantum of the reduction. Members further noted that enormous effort had gone into developing a detailed and transparent assessment process for the EFP Programme and an arbitrary, post-assessment reduction would entirely undermine this.

Having discussed the matter carefully and in detail, Members unanimously resolved that the imposition of any reduced form of offer of award following assessment of the application was not practical or technically possible and would not allow all of the guiding principles agreed earlier to be adhered to. Indeed, it was likely to be even more unsatisfactory than applying a reduction prior to assessment because of the increased opportunity to manipulate the result.

In any event, Members considered that it would constitute a departure from the published evaluation process which was very transparent and it would not be a fair or appropriate solution to apply in the circumstances of this case.

Members also agreed that the imposition of a reduction even later in the process (e.g. following identification of preferred bidders) would not avoid the same difficulties that had just been discussed and could be even more problematic as the process would be more advanced.

Finally, Members considered whether there was any possibility that a financial reduction could be determined *during* (as opposed to prior to or after) the assessment process. Members felt that this approach would not be at all appropriate as there would be no clear and fair way to reduce a financial award step-by-step as the application was assessed. Again it would be an arbitrary reduction, determined in an opaque manner, contrary to the principle of transparency, and for this reason it would be unfair to whomever was adversely affected by it (either BCC or other applicants). Either way the Council could be accused of manipulating the result to suits its own purposes through the quantum of the reduction.

Members therefore unanimously resolved that the imposition of any reduced financial award during the course of assessment was not practical or technically possible and would not allow all of the guiding principles agreed earlier to be adhered to. Members considered that it would constitute a departure from the published evaluation process and would not be a fair or appropriate solution to apply in the circumstances of this case.

Before moving on, Officers drew attention to the key areas of the OBC that would be impacted upon by a post assessment or a pre-assessment reduction – these were objectives and constraints; option identification, assessment monetary and non-monetary costs and benefits; appraisal of risk and uncertainty; calculation of net present values/costs; financing, management, marketing, monitoring and evaluation; appraisal results and conclusions and the timescale and deliverables. In other words most aspects of the Outline Business case would be affected by a reduced offer of award. This confirmed the view of Members that a financial reduction would not be appropriate in this case.

Members also confirmed that the withdrawal of the velodrome application had no bearing on their decision in relation the athletics application.

Having agreed unanimously that a financial reduction (either by way of a reduced percentage or a fixed sum reduction) at any stage of the process was not a fair or appropriate way to deal with the late BCC application, Members turned to consider whether a **points reduction** should be made (although they noted that a points reduction was probably not in contemplation when the Appeals Procedure was drafted).

Members considered that a points reduction would give rise to serious issues and have adverse effects at whatever stage it was applied (either pre-assessment, during assessment or post assessment). Members agreed they could not see how to apply a points reduction in a fair and transparent manner.

Officers explained that a reduction in points (either by percentage of points or an actual number of points), could, depending on the quantum of the points reduction, have either an inconsequential or a fatal impact on the application – a small points reduction might have no effect on the application at the end of the day; whereas a large points reduction might cause its elimination from the competition. It was pointed out that (as

with the financial reduction) any points reduction would be arbitrary in nature and therefore unfair or potentially unfair to anyone adversely affected by it. There is clearly no guidance on how to make a points reduction in the Programme documentation and there was no precedent for it in these circumstances. Members could not see that there was any fair way to link a points reduction to the lateness of the application.

It was noted that a points reduction, depending on the number of points deducted, might not actually adversely affect BCC in the ultimate outcome of the competition, in which case the penalty would carry no weight. Members discussed this at length. Ultimately, in the absence of any guidelines on how to apply a points reduction fairly, Members were uncomfortable with an arbitrary selection of a points penalty that may override the purposes and outcomes of the assessment process.

Members considered by analogy the method of points deduction applied at the start of the season by the FA where a football club had been placed into administration and it was asked whether this could be employed here. It was pointed out by some Members that all clubs participating in the league were aware that a points deduction was a possible penalty from the outset and there was a precedent for determining how and when it should be applied. That was not the case here and Members could not determine how the Council could logically and rationally arrive at the level of points deduction.

Members considered specifically the imposition of a points reduction determined *prior to any assessment* taking place. They discussed various ways in which a points reduction might be applied. Members felt that this would result in an inconsistent scoring framework to that applied to other applicants, affecting the consistency approach taken by the peer review and moderation process. Furthermore, the extent of the penalty brought about by the points reduction would be impossible to determine fairly prior to assessment and there was a risk that the points reduction might not, in fact, affect the outcome of the evaluation process for BCC. Members concluded that a points reduction pre-assessment would not be practical and would be inconsistent with the transparent assessment process applicable to other applicants.

Members considered also the possibility of determining a points reduction *following the assessment* of the BCC application (and other applications). Again, it was considered by Members that similar issues would arise and there was the added problem that the Council could be accused of manipulating the outcome of the process, whatever points reduction it chose. Members stated that they were very uncomfortable with this option.

Members also considered making points reductions *during the course of their assessment* of the BCC application but this was also considered to be inappropriate for the same reasons.

As well as an overall points reduction, Members considered the possibility of reduction of points allocated to specific assessment criteria. Members

agreed that any reduction of points in this way could also result in the artificial manipulation of the process, affecting detrimentally the very objectives of the programme. Members could not determine any objective rationale for selecting one criterion above another for a points reduction because of lateness. Members also agreed that with knowledge of the scores of other bids they could be placed in a very difficult position which would be less than transparent and that they would not be content with proceeding in this way.

Having discussed the matter carefully and in detail, Members unanimously resolved that the imposition of a reduced points award at any stage prior to, during or following assessment, would not be practical or technically possible; it would constitute a departure from the published evaluation process and would not be a fair or appropriate solution to apply in the circumstances of this case.

Members were asked to consider whether they could think of any other possible ways in which a reduction could be applied fairly to the BCC application or if there was any other matter that they felt ought to be considered.

Members concluded that they had, to the best of their ability and in good faith, considered all relevant options and decided unanimously that neither a financial nor a points reduction could or should be made in this case.

Members noted that as a result of this decision they would not be required to decide on the quantum of any reduction.

### **Acceptance or Non-Acceptance of BCC Application in full**

Members were then asked to consider whether to exercise their discretion to admit the BCC application in its entirety. Members noted that they were being asked to make this decision afresh.

Members were invited to discuss what factors they felt were relevant to the exercise of their discretion and what weighting should be given to each of them. Members were referred again to paragraph 5.2 and 10.2 of the Paper.

Members agreed unanimously that it was most important for applicants to comply with the timing requirements of the application process and it was noted that applicants had been reminded on numerous occasions of the importance of adhering to the deadline.

Members noted that this was a very competitive process and significant funds were being sought, but only limited funds were available. The nature of the programme reinforced the need to have rules and to adhere to them.

Members noted that, in the interests of ensuring fairness and equal treatment, all applicants were given the same deadline to meet and that BCC was the only applicant to fail to meet it at Stage Two.

Members considered that given that applicants had 5 months to prepare their applications and had been reminded on several occasions of the importance of meeting the deadline, it was reasonable for the Council to expect submission on time. Members considered that the timing rules were fair and appropriate in the circumstances, and ought to be applied fairly and equitably to all applicants.

Members were reminded that a number of applicants had been eliminated at Stage One of the competition for failing to meet the deadline at that stage – some only by a couple of minutes. Members noted that late information submitted by Comber Rifle Club and Derry City Council at Stage One had not been accepted.

Members considered the argument that any breach of the timing requirements was de minimis and that non-acceptance of the application was disproportionate in the circumstances.

The arguments put forward by BCC and FGS McClure Watters were considered by Members, including that other applicants would not suffer hardship by the admission of the application and that no unfair advantage had been gained by being late.

After considerable discussion, it was agreed by Members that, while the applications may only have been 2 or 3 minutes late, the deadline had still been missed. Members considered that if breaches of the deadline were permitted, it would not be clear at what point a breach would become material (if not at the time the deadline was missed). Members noted that it was common practice in the business world for deadlines to be set and it was reasonable to expect them to be adhered to. It was pointed out that the BCC website itself indicated that bids for BCC work would not be accepted even if they were one minute late, and FGS' promotional material also recognised the importance of delivering on time.

Members put significant importance on meeting the deadline and made it clear that in their minds this outweighed any arguments that other applicants would not have suffered hardship or that no unfair advantage had been gained (both of which could be disputed anyway).

The issue of public interest had clearly been raised by the applicant and FGS and Members were invited to consider this also.

Correspondence from BCC and FGS was considered including arguments made that the widest possible range of bids ought to be considered, significant amounts of public funds may have been spent preparing and submitting the bids, Belfast was the largest council area in NI and the location of the majority of the population. It was noted also that BCC had made a claim that the ability of Belfast to host international sporting

events would be critically impaired if funding for Indoor Athletics was not forthcoming and the people of Belfast would suffer hardship as a result.

Members noted that the programme was guided by the value for money of investments and not any argument of population density. It was also noted that it had been determined at the outset of the programme that the public interest would be best served by a Northern Ireland wide competition, rather than the strategic selection of sites.

Members noted that their responsibility was to consider the interests of the people of Northern Ireland as a whole and that they had received applications from across NI. Members agreed that they had to be fair to all applicants and to all the people of Northern Ireland and not show any particular preference to any population group or geographic area. As regards the costs of bidding, it had been made clear to applicants that the costs of participation in the programme were to be borne at their own risk.

It was noted that an Indoor Athletics application had been received from Antrim Borough Council, among bids for other sports from other applicants. Even if the BCC application was not admitted, athletics as a sport might still receive funding.

Members agreed unanimously that the public interest could still be served if the BCC application was rejected. It could still be served by other applications.

Members went on to distinguish this programme from other programmes such as the Investing in Performance Sport ('IPS') Programme. It was noted that late applications had been admitted under other programmes (such as IPS) but there were good reasons for this. For example, the characteristics of the IPS programme were entirely different from the EFP; there were remaining funds in IPS that had to be spent and for this and various other reasons relating to the characteristics of that programme, the Council was entitled to treat it differently.

Members considered whether there were any special or exceptional circumstances that arose in this case that could excuse the lateness of the application.

Members noted the claims that had been made that computer server/printer problems had delayed the filing of the application and that these had been flagged prior to the deadline. Members also noted FGS' claim that a major rewrite of tender documents had been required because of the provision by SNI of certain additional information in relation to volleyball.

Members agreed that computer server/printer problems were not acceptable as an excuse for lateness. All applicants had to deal with and guard against the possibility of technical or logistical difficulties.



As regards the additional information in relation to volleyball, having reviewed the available documentation, Members agreed that the vast majority of information had been made available to the applicant for some time and/or was already in the public domain. It was agreed that the small amount of new information provided should not have had a material effect on the preparation of any application or caused a significant or major rewrite. It was further agreed that there was no obvious reason why any new information provided in respect of the volleyball application ought to have had any effect on the timing of the submission of the Indoor Athletics application, which was a quite separate bid from the Velodrome bid (which included volleyball).

Members were invited to raise and/or consider any other relevant factors, but none were raised.

The Chairman invited Members to confirm that they had given the matter their full consideration and to formally decide whether to exercise their discretion and admit the BCC application.

Members confirmed unanimously that they had considered the matter fully and that they should not exercise their discretion to admit the BCC application.

Members considered that in the interests of fairness, transparency and the integrity of the EFP programme, they should refuse to accept the late BCC application. Members concluded that of all the factors referred to above, they should attribute the most weight to the requirement to comply with the deadline for submission of the applications. This was a most important consideration for them in the context of the present competition and no other factor took precedence. It was agreed that there were not special or exceptional circumstances that excused the lateness and that the non-admission of the application was a proportionate and reasonable response in all of the circumstances of this case. The application was late and having taken account of all relevant factors Members decided to reject the application in its entirety. Members confirmed that there was nothing in the correspondence or documentation received from BCC or FGS that changed their mind on this issue.

Members confirmed that the 'without prejudice' offer made by Solicitors for FGS McClure Watters in correspondence on 21 August 2009 should also be rejected.

## **8. ANY OTHER BUSINESS**

8.1 The Chairman thanked Members for their time and extensive detailed deliberations over these decisions. Members commended staff for their contribution to the meeting.

## **8.2 INVITATION TO VISIT NEW YORK AND WASHINGTON**

Members considered tabled Paper SNI/09/161 and noted that the Chief Executive had been invited by the Northern Ireland Bureau in Washington

and Co-operation Ireland to make representations on their behalf and on behalf of Sport and Sport Northern Ireland in New York and Washington over the period 6 October - 14 October 2009. Objectives of the trip included Shared Future and Members agreed that 2012 Olympics should also be included.

Members approved the recommendations to accept the invitation from the Northern Ireland Bureau and Co-operation Ireland.

9 **DATE OF NEXT MEETING**

The next scheduled meeting of 6 October would not now take place and Members would be contacted with a new date.

The meeting was closed.

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